

No. 225.

IN THE
United States Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiffs in Error,

vs.

JOHN M. McDONALD,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

RUSSELL J. WILSON,

Attorney for Defendant in Error.

Raveley Printing Co., 518 Clay St., S. F.

FILED

JUN - 8 1895

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR
THE DISTRICT OF MONTANA.

UNITED STATES OF AMERICA,
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vs.

JOHN M. McDONALD,
Defendant in Error.

No. 225.

BRIEF OF DEFENDANT IN ERROR.

This was an action commenced by petitioner to recover compensation due him for clerical services rendered in the office of the United States Attorney for the District of Montana for the years 1891 and 1892.

The claim of petitioner for compensation for the year 1892 was disallowed by the Court but was allowed for the year 1891, and it was from the judgment in favor of petitioner for \$1237.50 for compensation for 1891 that the United States appealed. The only question, therefore, on this appeal is whether the petitioner is entitled to compensation for services rendered to and accepted by the United States for the year 1891.

It is shown in the record that early in 1891 the United States Attorney for the District of Montana was in pressing need of assistance, owing to the increasing business of the United States, and made application to the Attorney-General of the United States for the appointment of an assistant, and that on February 10th, 1891, the Attorney-General wrote to the United States Attorney for the District of Montana, authorizing him to appoint a person for the discharge of clerical services in his office at Helena, Montana, at a compensation not exceeding \$1500 per year, *such person to be an attorney-at-law who could assist him in the Courts.* (See pp. 33 and 34 of Trans., and also Opinion of the Court below on the construction of this letter, pp. 17 and 18 of the Trans.)

Under this written authority Mr. McDonald, defendant in error, was on March 12th, 1891, appointed such clerk and occupied the position and discharged its duties until the end of the year, his salary to December 31st, 1891, at the rate of \$1500 per year being \$1237.50. This amount of salary was included in the return of the District Attorney for 1891 but was disallowed by the Comptroller and the only recourse of petitioner was an appeal to the Courts. (See letter of Attorney-General Miller, pp. 38 and 39 of the Trans.)

It would seem, however, that the only cause of the disallowance of petitioner's salary was because he was styled "Assistant Attorney" instead of "Clerk" in the return of the District Attorney for 1891.

This inconsequential error seemingly arose because of the language used by the Attorney-General in his

letter of February 10th, 1891, authorizing the appointment as clerk of a person who was an attorney-at-law and who could assist in the Courts, but the District Attorney subsequently corrected this error as to Mr. McDonald's official title and wrote the Comptroller as follows:

“He is a clerk in my office, appointed by me under directions of the Attorney-General, at a salary of \$125 per month, to be paid out of the emoluments of this office.” (See p. 42, Trans.)

Notwithstanding this correction the allowance was not made of petitioner's salary and his only remedy was to bring this action.

The petition sets forth that there is due petitioner for clerical services from March 12th to December 31st, 1891, the sum of \$1237.50 and the answer *admits* that by authority of the Attorney-General of the United States defendant in error performed the said clerical services in 1891 in the office of the United States District Attorney for the District of Montana (see pp. 8 and 14, Trans.), and this admission is further confirmed by the Brief of Counsel for the Government at p. 2 wherein it is said: “The answer admits the appointment by the District Attorney, and the services performed and the price charged, so far as pertains to the first item, to-wit: from March 12th to December 31st, 1891.”

It would seem as if this admission as to the year 1891 were conclusive of the rights of the parties and that the judgment of the lower court should be forthwith affirmed.

Under this unequivocal admission how can it be said, as alleged in pages 2 and 3 of Brief of Plaintiffs in Error, that the Court erred in finding as a fact that from the 12th day of March, 1891, to the 31st day of December, 1891, the plaintiff performed services for the United States as clerk in the office of the United States District Attorney for the District of Montana?

Or, in view of the admission aforesaid, how can it be said that the Court erred in finding that Mr. McDonald was employed to perform said services for the United States by the District Attorney for the District of Montana and that his salary was fixed at \$1500 per annum?

Or, in view of the letter of authorization of February 10th, 1891, of Attorney-General Miller and the appointment of Mr. McDonald thereunder, how can it be said, as alleged on page 3 of Brief of Plaintiff in error, that the Court erred in finding that the District Attorney was authorized to employ Mr. McDonald at said salaay?

It naturally follows from the above that the Court did not err in its conclusion of law that Mr. McDonald was entitled to a judgment against the United States for the sum of \$1,237.50, and did not err in giving plaintiff judgment for that sum against the United States.

The learned counsel for the Government, on page 4 of his brief, insists that the services of a clerk in the office of the United States District Attorney are payable from the fees and emoluments of the office, and not payable otherwise by the United States.

In this behalf we beg leave to suggest that even if this were so, the District Attorney included Mr. McDonald's

salary in his return, desiring and requesting that the same be paid out of the emoluments of his office, but that the Comptroller disallowed the account, and the only recourse left to Mr. McDonald was an appeal to the Courts, as suggested by ex-Attorney-General Miller. See pp. 38 and 39 of Record.

The position of the learned counsel for the Government that the provisions for compensation of such clerks are exclusively matters of contract between them and the District Attorney is scarcely tenable, when the letter of the Attorney-General of February 10th, 1891, authorizing the appointment and fixing the salary of Mr. McDonald is considered. If Mr. McDonald was to be a mere personal employee of the District Attorney, and not of the Government, the Attorney-General would hardly have gone so far as to fix the amount of his salary. (See Opinion in Trans., pp. 17 and 18.)

As to the point taken by the plaintiff in error that in order that a District Attorney should have the help of a clerk in his office, and whose pay can come from the emoluments of his office, he must first get permission from the Attorney-General for such help, we invite the attention of the Court to the fact that by the Attorney-General's letter of February 10th, 1891, already referred to, this desired permission was granted to the District Attorney, and that under this letter and authorization Mr. McDonald was duly employed, and satisfactorily discharged the duties of his office.

There seems to be in the mind of the learned counsel for the Government some confusion as to the meaning of the concluding sentence in the letter of February 10th,

1891, of the Attorney-General, and we invite the attention of the Court, and counsel for the Government, to its proper interpretation, as set forth in the opinion of the learned Judge in the Court below, on pages 17 and 18 of the Transcript.

Mr. McDonald was appointed to perform "clerical services," and *not* appointed an "Assistant United States Attorney," and therefore the concluding sentence of the letter of February 10th, 1891, which refers only to the appointment of an "Assistant United States Attorney," is misleading and of no consequence on this appeal.

The fact that Mr. McDonald was improperly *called* an Assistant District Attorney did not make him one, and the contrary is shown by the language of the United States District Attorney already alluded to. (p. 42 Trans.)

Counsel for the Government insists on page 6 of his brief, that the District Attorney employed Mr. McDonald to work for him personally, and not for the Government, under the authority of the Attorney-General, but we submit that this condition cannot, by any construction, be inferred from the record.

It would be strange indeed if a District Attorney could not employ a clerk at any time at his own expense without the permission of the Attorney-General. The fact that in advance he made application to the Attorney-General for permission to engage help, and that such permission was granted and the salary fixed by the Attorney-General, is conclusive proof that it was never contemplated that Mr. McDonald's salary was to be paid by the District Attorney personally, or by any one other than the United States.

As to the assertion in the brief, on page 6, that the matter of the allowance of Mr. McDonald's salary was suspended because not presented in proper form, and is yet pending before the Department awaiting correction before payment, we beg leave to say that the letter of the Comptroller of March 9th, 1892, (p. 42 Trans.) requires of the District Attorney an impossible condition before the allowance of Mr. McDonald's salary, to-wit: a sworn statement that Mr. McDonald did not perform any services as an attorney, whereas the very letter authorizing his appointment contemplated the selection of an attorney, and the performance by him of services both as clerk and in Court assisting the District Attorney. Is Mr. Miller's appointment to a position requiring double duty to be the cause of Mr. McDonald's receiving pay for neither service, because it cannot be said he did no *legal* work?

The authorities in the brief of counsel for the Government, we submit, have no application to the case at bar, and the peculiar circumstances surrounding it. The defendant in error rendered valuable services to the Government, at its request, and the benefit of which it accepted and received at all times, and no technical misnomer in the designation of his office, or in his appointment, should be at this day invoked to defeat his meritorious claim.

We respectfully ask the Court's attention to the able opinion of the Judge in the Court below. (pp. 12 to 24 of the Transcript.)

In conclusion, we respectfully submit that the United States District Attorney was officially authorized to ap-

point Mr. McDonald, and that he performed the required services under the appointment, from March 12th, 1891, to December 31st, 1891, and that his lawful salary for that period was \$1,237.50 ; that the United States Government accepted the services and should be compelled to pay for the same, and we therefore respectfully ask that the judgment of the Court below be forthwith affirmed.

RUSSELL J. WILSON,
Solicitor for Defendant in Error.

